EV 06-0160-C H/H Beverly v Talsma
Judge David F. Hamilton Signed on 03/28/08

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

WILLIAM C. BEVERLY,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 3:06-cv-00160-DFH-WGH
	)	
BRIAN TALSMA,	)	
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

WILLIAM C. BEVERLY,	)	
	)	
Plaintiff,	)	
v.	)	CASE NO. 3:06-cv-0160-DFH-WGH
	)	
BRIAN TALSMA,	)	
	)	
Defendant.	)	

ENTRY ON MOTION FOR SUMMARY JUDGMENT

Plaintiff William C. Beverly ("Beverly") alleges in this civil rights action that he was the victim of unconstitutional excessive force during the course of his arrest by defendant Brian Talsma, an Evansville police officer, on August 25, 2005.

Officer Talsma seeks summary judgment on the grounds that Beverly's claim is barred by the doctrines of *Heck v. Humphrey*, 512 U.S. 477 (1994), collateral estoppel (issue preclusion), and *res judicata* (claim preclusion). For the reasons explained in this Entry, Officer Talsma's motion for summary judgment must be granted.

I. *Background*

A motion for summary judgment must be granted pursuant to Rule 56(c) of the *Federal Rules of Civil Procedure* "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." "Factual disputes are 'genuine' only 'if the evidence is such that a reasonable jury could return a verdict for the [non-movant].'" *Oest v. Illinois Dep't of Corrections*, 240 F.3d 605, 610 (7th Cir. 2001), quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A "material fact" is one that "might affect the outcome of the suit." *Anderson*, 477 U.S. at 248. A dispute is genuine only if a reasonable jury could find for the non-moving party. *Id.*

Because Beverly is proceeding without counsel, the notice required by *Lewis v. Faulkner*, 689 F.2d 100 (7th Cir. 1982), was issued. Through this notice, Beverly was notified of the nature of the defendant's motion, of the proper manner in which to respond, and of the possible consequences of failing to respond. Beverly responded with a "response," a "verified affidavit," a "motion to amend," a "supplement to motion to amend," and evidentiary materials. The court also considered other evidentiary materials of record, including the declaration that Beverly submitted in support of his own motion for summary judgment and excerpts from the transcript of Beverly's criminal trial.

Rule 56 requires more than bald assertions of the general matter asserted. *Drake v. Minnesota Mining & Mfg. Co.*, 134 F.3d 878, 887 (7th Cir. 1998). Affidavits must show affirmatively that the affiant is competent to testify to the matters stated therein and cite specific concrete facts establishing the existence of the truth of the matter asserted. Fed. R. Civ. P. 56(e); Fed. R. Evid. 602 (witness permitted to testify only to those matters about which he or she has personal knowledge). Assertions in affidavits that consist of legal argument and conclusory allegations without supporting evidence will not defeat a motion for summary judgment. See *Shank v. William R. Hague, Inc.*, 192 F.3d 675, 682 (7th Cir. 1999); *DeLoach v. Infinity Broadcasting*, 164 F.3d 398, 402 (7th Cir. 1999); *Pfeil v. Rogers*, 757 F.2d 850, 862 (7th Cir. 1985). In deciding the defendant's motion for summary judgment, the court has considered evidentiary materials that comply with the foregoing standards but has disregarded those that do not.

II. *Discussion*

A. *Findings of Undisputed Fact*

On the basis of the pleadings and the expanded record, and specifically on the portions of that record that comply with the requirements of Rule 56(e), the following facts are undisputed for purposes of Officer Talsma's motion.

At approximately 6:45 p.m., on August 25, 2005, Officer Talsma was on duty when he went to the Roadside Inn Hotel in Evansville, Indiana, to serve an

arrest warrant on Germaine Vaughn for dealing in cocaine. Officer Talsma saw plaintiff William Beverly exit Vaughn's hotel room.

Officer Talsma then stopped and questioned Beverly about illegal drug use or involvement. Beverly denied purchasing drugs at that time. Officer Talsma decided to pat Beverly down for drugs or weapons. Beverly was holding a metal cane.

A fight between the two men ensued, the circumstances of which are disputed. Officer Talsma told Beverly he was "under arrest." At some point Officer Talsma used a remote control device to release his canine Provi from his police car. Provi engaged Beverly on the upper left thigh, and Officer Talsma, Beverly, and Provi all went to the ground. At this time, approximately 6:46 p.m., Officer Talsma radioed for assistance. The men continued to fight. Officer Talsma told Beverly to stop resisting and put his hands behind his back. Beverly did not put his hands behind his back.

Officer Talsma and Provi never gained complete control of Beverly until approximately 6:50 p.m. when they were assisted by Officers Dickinson and Matthews, who eventually handcuffed Beverly. Once the officers had Beverly under control, Officer Talsma had Provi release Beverly and no further force was used.

Following the arrest, the officers took Beverly to Deaconess Hospital at approximately 7:08 p.m. Beverly was released from treatment for dog bites at Deaconess Hospital at approximately 9:17 p.m. After his release, he was taken to the Evansville Police Department headquarters. He was charged with battery on a police officer (a class D felony) and resisting law enforcement (a class D felony).

On August 29, 2005, Beverly was formally charged in *State v. Beverly*, 82C01-0508-FD-963, with battery on a police officer (a class D felony) and resisting law enforcement (a class D felony). The factual basis for the charges was Beverly's battery on Officer Talsma and Beverly's unlawful resistance to Officer Talsma, resulting in injuries to Officer Talsma. On May 16, 2006, after a jury trial, Beverly was found guilty of battery (a class A misdemeanor) and resisting law enforcement (a class D felony). Beverly also pleaded guilty to being a habitual offender. On June 21, 2006, Beverly appealed his convictions. On March 14, 2007, in a "Memorandum Decision – Not For Publication," the Indiana Court of Appeals affirmed Beverly's convictions in *Beverly v. State*, No. 82A01-0607-CR-283.

B. *Conclusions of Law*

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated." The Fourth Amendment governs the claim

against the defendant. *Graham v. Connor,* 490 U.S. 386, 395 (1989) ("[A]ll claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . .").

A police officer's ability to make a stop or an arrest "necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it," but the Fourth Amendment prohibits the use of excessive force during the execution of a seizure or arrest. *Id.* at 395-96; see *VanGilder v. Baker,* 435 F.3d 689, 692 (7th Cir. 2006) (even resisting arrest does not give police freedom to use any level of force the choose); *Estate of Phillips v. City of Milwaukee,* 123 F.3d 586, 592-93 (7th Cir. 1997) (when an offender is resisting arrest, an officer can use that amount of force necessary to overcome the offender's resistance).

Officer Talsma first argues that Beverly's excessive force claim is barred by the doctrine of *Heck v. Humphrey*, 512 U.S. 477 (1994). "*Heck* bars any suit for damages premised on a violation of civil rights if the basis for the suit is inconsistent with or would undermine the constitutionality of a conviction or sentence." *Wiley v. City of Chicago,* 361 F.3d 994, 996 (7th Cir. 2004). "Should success in a civil suit necessarily imply the invalidity of a conviction or sentence, *Heck* requires the potential plaintiff to wait until his conviction is nullified before bringing suit." *Id.* "[A] plaintiff's claim is *Heck*-barred despite its theoretical compatibility with his underlying conviction if specific factual allegations in the

complaint are necessarily inconsistent with the validity of the conviction . . . ." *McCann v. Neilsen*, 466 F.3d 619, 621 (7th Cir. 2006); see also *Apampa v. Layng*, 157 F.3d 1103, 1105 (7th Cir. 1998) ("The principle of *Heck* is that a civil suit which necessarily challenges the validity of the plaintiff's conviction cannot be maintained until and unless the plaintiff gets his conviction set aside, even if he does not seek in the civil suit a remedy that would undo his conviction."). The key point here is that for *Heck* to apply, success in the civil suit must "*necessarily* imply that the plaintiff's conviction was unlawful." *Nelson v. Campbell*, 541 U.S. 637, 647 (2004); *VanGilder v. Baker*, 435 F.3d 689 (7th Cir. 2006) (*Heck* did not bar claim of excessive force even though plaintiff had been convicted of resisting a law enforcement officer where plaintiff did not deny his resistance or challenge the factual basis for the conviction). If a successful civil action would not necessarily imply the invalidity of any criminal conviction against the plaintiff, the case should be allowed to proceed. *Heck*, 512 U.S. at 487.

Although Officer Talsma recognizes that a claim for excessive force is not necessarily barred by *Heck*, he contends that Beverly's claim is barred because Beverly makes specific factual allegations that are necessarily inconsistent with the validity of his criminal convictions. See *McCann*, 466 F.3d at 621; *Okoro v. Callaghan*, 324 F.3d 488, 490 (7th Cir. 2003) (As "master of his ground," if a plaintiff makes allegations that are inconsistent with his valid convictions, "*Heck* kicks in and bars his civil suit.").

The court has before it two very different versions of what happened between Beverly and Officer Talsma. Under the defense version, the defense clearly would prevail on the ground that there was no violation of Beverly's constitutional rights. Under the plaintiff's version, as set out in the amended complaint, the declaration that Beverly filed with his own motion for summary judgment, and his testimony in his criminal trial, Officer Talsma used excessive force and violated Beverly's Fourth Amendment rights. The problem for Beverly is that his version of events runs straight into the barrier of *Heck* because his version necessarily implies that his convictions for battery and for resisting law enforcement were unlawful. See *Okoro*, 324 F.3d at 490 (district court erred by allowing trial on claim that police officers stole gems and cash from plaintiff in course of arrest; *Heck* barred theft claim where plaintiff "adhered steadfastly to his position" that he was innocent of any wrongdoing, despite his conviction on drug trafficking charge).

In his amended complaint, Beverly alleges that on August 25, 2005, Officer Talsma stopped him for questioning without just cause, and that during the questioning, Officer Talsma released his canine from his police cruiser via remote control. Beverly alleges that the canine immediately attacked him, taking him to the ground. He alleges that he was a 51 year old man in poor health and "was in no way, shape, or form a threat to Officer Talsma." Beverly contends that at no time was Officer Talsma in danger, but that Officer Talsma continued to allow the canine to bite and tear Beverly's thigh and shoulder until a back-up unit arrived

and took control of the situation. Beverly adhered to essentially the same version in more detail in the sworn declaration that he filed in support of his own motion for summary judgment. See Dkt. No. 44.

Officer Talsma states that after he asked Beverly about drug use, Beverly backed away and then swung his cane at Officer Talsma's head. Beverly denies this, stating in his declaration that he stumbled backward when Officer Talsma tried to cuff him, causing him to grab the officer's arm. Officer Talsma further states that when he tried to pat Beverly down for weapons or drugs, Beverly charged him and drove him onto the hood of a parked car. Officer Talsma ordered Beverly several times to stop resisting and tried to take Beverly to the ground to gain control of him. Beverly refused to obey Officer Talsma's commands. Officer Talsma states that Beverly attempted to grab Officer Talsma's gun and that the canine engaged Beverly's right shoulder or arm, causing Beverly to let go of Officer Talsma's gun.

Beverly was found guilty of resisting law enforcement as a Class D felony, which means that the jury found that while Beverly was committing the offense of resisting law enforcement, he inflicted bodily injury on Officer Talsma. *Beverly v. State*, No. 82A01-0607-CR-283, at 5-6. Indiana Code § 35-44-3-3(a) provides that the offense of resisting law enforcement is committed by a person who "knowingly or intentionally forcibly resists, obstructs, or interferes with a law enforcement officer . . . while the officer is lawfully engaged in the execution of the

officer's duties." *Id*. The offense is a Class D felony if the person "inflicts bodily injury." Ind. Code § 35-44-3-3(b)(1)(B). The Indiana Court of Appeals affirmed the conviction, finding that Officer Talsma's scrapes to his knee and elbows during the fight with Beverly were sufficient "bodily injury" to sustain the felony conviction of resisting law enforcement. *Beverly v. State*, 82A01-0607-CR-283, at 7-8.

The charging information for the charge of battery alleged that Beverly touched Officer Talsma "in a rude, insolent, or angry manner by pushing the said officer into a parked vehicle . . . ." *Beverly v. State*, 82A01-0607-CR-283, at 3. Beverly was found guilty of battery as a class A misdemeanor, meaning that the jury found that Beverly pushed Officer Talsma into a parked car, but did not inflict bodily injury on Officer Talsma during the battery. *Id*. at 6. See Ind. Code § 35-42-2-1(a)(1)(B). The Indiana Court of Appeals affirmed the conviction.

Beverly argues that the validity of his convictions is not at issue in this case, and that the issue is only whether the defendant applied excessive force during the arrest. In theory there is a middle ground between the plaintiff's and the defendant's versions of the facts in this case, and in that middle ground, *Heck* would not bar a claim for use of excessive force. See *Okoro*, 324 F.3d at 489-90 (recognizing theoretical possibility that plaintiff could have been guilty of heroin distribution and police officers could have stolen gems and cash they found in their search of plaintiff). Here one could find the middle ground by assuming that plaintiff in fact pushed Officer Talsma into the parked car (battery as a Class A

misdemeanor) and forcibly resisted arrest and caused bodily injury (resisting law enforcement as a Class D felony), while arguing that under those circumstances, even if the officer was entitled to use some force, he did not act reasonably by turning loose a police dog to bite Beverly for up to five minutes. See *VanGilder*, 435 F.3d at 692 (application of *Heck* to every excessive force claim in which plaintiff had been found guilty of resisting arrest would "open the door to undesirable behavior and gut a large share of the protections provided by § 1983").

Okoro teaches, however, that the court should not strike out on its own to find and occupy this middle ground. The district court had allowed the theft claim to go to trial against the police officers because of "the theoretical possibility mentioned in our opinion that the defendants had both found illegal drugs in Okoro's home and stolen gems and cash that they also found there." 324 F.3d at 490. The next two sentences from the Seventh Circuit provide the lesson for this case: "This was error. Okoro adhered steadfastly to his position that there were no drugs, that he was framed; in so arguing he was making a collateral attack on his conviction, and *Heck* holds that he may not do that in a civil suit . . . ."

Beverly alleges in his amended complaint that during the questioning by Officer Talsma, the canine was released and it immediately attacked him, taking him to the ground. He further alleges that he "was in no way, shape, or form, a threat to Officer Talsma." In essence, Beverly claims that he did not resist Officer

Talsma at all and that he did not do anything unlawful. Beverly's allegations and supporting testimony necessarily call into question his conviction for a misdemeanor battery (he pushed the officer into a parked car) and his conviction for resisting law enforcement as a felony (he forcibly resisted, obstructed, or interfered with the officer and caused bodily injury). Under these circumstances, because Beverly has pleaded and offered testimony of facts that are inconsistent with and necessarily imply the invalidity of his underlying criminal convictions, his claim of excessive force is barred by *Heck*. The court need not address the other grounds on which Officer Talsma seeks summary judgment.

This is not a case like *McCann*, in which the complaint was ambiguous as to whether the plaintiff was necessarily challenging the validity of his conviction. See *McCann*, 466 F.3d at 622-23 (reversing judgment on the pleadings based on *Heck* and remanding to give plaintiff an opportunity to clarify ambiguity and steer his complaint to middle ground not barred by *Heck*). Throughout this civil case – from the pleadings through the presentation of evidence on motions for summary judgment – plaintiff Beverly has adhered steadfastly to his version of the facts in which he committed no crime at all, neither battery nor resisting law enforcement nor anything else. Based on the reasoning of *Okoro*, therefore, the court must conclude that Beverly's claim for excessive force is barred by *Heck* unless and until his convictions are set aside. Accord, *McCann*, 466 F.3d at 622 ("The question for us, then, is not whether [plaintiff] *could have* drafted a complaint that steers clear of *Heck* (he could have), but whether he did.").

III. *Conclusion*

The defendant's motion for summary judgment (Dkt. No. 49) is granted, and judgment consistent with this Entry shall now issue. The dismissal shall be without prejudice, so that if the *Heck* bar is removed at some future time, Beverly's claim will actually accrue and could be asserted in an appropriate forum. All other pending motions are denied as moot. Judgment consistent with this Entry shall now issue.

So ordered.

Date: March 28, 2008

DAVID F. HAMILTON, CHIEF JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
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EVANSVILLE DIVISION

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	)	
BRIAN TALSMA,	)	
	)	
Defendant.	)	

FINAL JUDGMENT

The court, having this day made its Entry granting defendant's motion for summary judgment, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff William C. Beverly take nothing by his complaint against defendant Brian Talsma and that this action is dismissed without prejudice.

Date: March 28, 2008

DAVID F. HAMILTON, CHIEF JUDGE
United States District Court
Southern District of Indiana

Laura Briggs, Clerk
United States District Court

By: Deputy Clerk

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